

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4749 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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MAHESHKUMAR PADMAKANT PANDYA

Versus

DINUBHAI NAIK & ORS.

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Appearance:

MR KETAN DAVE for Petitioner

MR MUKESH PATEL for Respondent No.3 & 4

None present for Respondent No.1 & 2

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision:13/12/96

#### C.A.V. JUDGMENT

The petitioner, a teacher in the school, respondent No.2, filed this petition challenging the order dated 9th May 1983 under which his services were terminated.

2. The petitioner was appointed as an Assistant Teacher, in the respondent-school with effect from 14th



October 1982 under the order dated 8th October 1982, annexure 'B'. The petitioner has served in the academic year 1982-83. The petitioner has come up with the case that he has been appointed on the post after applications were invited from open market and he has been selected by the Selection Committee. The services of the petitioner had been terminated as the Department has raised objections against the same. The Department has taken objection that the ratio of backward class candidates was not maintained and that the petitioner was not fully qualified as he was not M.Com.

3. The learned counsel for the petitioner contended that termination of services of the petitioner is wholly arbitrary. In the Selection Committee, a representative of District Education Officer was also present and he has not raised any such objection against the selection of the petitioner. It has next been contended that there is a Government Circular which provides that in case of non availability of backward class candidates any general category candidate can be appointed. He has further submitted that there is further Resolution of the Government that in case the candidates with necessary qualifications are not available, then candidates with lesser qualifications can be appointed.

4. On the other hand, Shri Mukesh Patel, learned counsel for the respondent No.3, contended that the post was reserved for backward class candidate and as such, no candidate of General category could have been given appointment. The petitioner was not possessing minimum qualification prescribed for the post and as such the Department has not committed any illegality in raising objection against the appointment.

5. I have given my thoughtful considerations to the submission made by the learned counsel for the parties.

6. The advertisement under which the applications were invited for making appointment on the post of Assistant Teacher has not been produced by the petitioner on record of this case. The learned counsel for the petitioner does not dispute that the petitioner was not possessing, at the relevant time, qualification of M.Com. In absence of the advertisement issued, it is difficult to say what was the content thereof. The learned counsel for the petitioner admits that the post was reserved for the candidates belonging to backward community. The advertisement under which the applications were invited was relevant and material document. From this document it could have ascertained whether the post was stated to



be reserved for backward community or not, and what qualifications were mentioned in the advertisement to be possessed by the candidates. Further, an important fact could also have been ascertained from the advertisement that in case of non availability of suitable candidate from the backward community, whether a candidate from general category can be appointed or not. Over and above that it would also have been ascertained from the advertisement that whether it has been disclosed therein or not that in case of non availability of candidates with necessary qualification of M.Com. a candidate with lesser qualification can be considered for appointment or not. The petitioner has concealed this document from this Court and as such, adverse inference deserves to be drawn against him. Moreover, the petitioner should have produced all relevant document in the writ petition so that the Court may know all the facts relevant to the controversy. The order of appointment of the petitioner dated 8th October 1982 contains specific condition that this appointment is made for one year, i.e. for the academic year and in case the Education Department raises any objection against the appointment, the same shall be liable to be terminated at the end of year 1982-83 (academic). So, it was a conditional order and the petitioner has accepted that appointment subject to the aforesaid condition. The appointing authority was also aware of the fact that Education Department may raise objection against this appointment and rightly so because twofold serious lapses were there in the appointment, i.e. the appointment has been made of a general candidate against reserve category post and secondly the petitioner was not possessing the minimum qualification prescribed for the post. The learned counsel for the petitioner does not dispute that minimum qualification was of M.Com., B.Ed. The appointment of a general candidate made against the post reserved for backward community is ab-initio illegal. It is too difficult to accept the contention of the petitioner that the candidate of backward community was not available. The petitioner could have been appointed only when suitable candidate of backward community was not available but the petitioner has to establish as a fact that this exercise has been undertaken by the respondent-management of the school. In case suitable candidates of reserved category with qualification of M.Com. B.Ed. would not have been available, then the next step would have been taken by the respondent-management to invite applications from reserved category after relaxing the qualification. Even then if suitable candidate was not available then only the respondent-management could have, with prior sanction of the Department, proceeded to make appointment of a



candidate belonging to general category from the open market. In case the candidates possessing M.Com. Degree are not available, then in the original advertisement it should have been mentioned that the candidate with lesser qualification can also apply or second advertisement should have been issued inviting applications from the candidates possessing qualifications below M.Com. In the present case, the petitioner has not produced the advertisement on record of the case. In absence of these material facts, the only inference comes out that it is a case where the petitioner has been favoured by the Management. It is true that in Selection Committee, a representative of the Department was present, but merely because he has not raised any objection, it cannot be said that the Department is precluded from raising objection subsequently. The appointment of the petitioner against reserved category post without there being any satisfactory proof on record that suitable candidate of that category was not available, is ab-initio void and as such, no interference is called for in the order of termination. Otherwise also, the petitioner was not eligible for appointment as he did not fulfilled the qualification of M.Com. In case the order of termination of services of the petitioner is set aside by this Court, then this Court will perpetuate restoration of illegal appointment of the petitioner. Sitting under Article 226 of the Constitution, this Court will not perpetuate any illegality.

7. It is a settled law that writ of Mandamus or writ of Certiorari, where effect of quashing of the impugned order would be to restore illegal order, cannot be issued. If any reference is needed, then reference may have to the decision of Supreme Court in the case of Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors., reported in AIR 1966 SC 828, decision of Rajasthan High Court in the case of Jagan Singh v. State Transport Appellate Tribunal, Rajasthan and Anr., reported in AIR 1980 RAJ 1, the decision of Kerala High Court in the case of A.M. Mani v. Kerala State Electricity Board & Ors., reported in AIR 1968 KER. 76, and also to decision of Patna High Court in the case of Devendra Prasad Gupta v. The State of Bihar & Ors., reported in AIR 1977 PATNA 166.

8. In the result, this writ petition fails and the same is dismissed. Rule is discharged. No order as to costs.

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(sunil)